



# **Veterans Affairs: The U.S. Court of Appeals for Veterans Claims—Judicial Review of VA Decision Making**

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## Summary

Congress, through the Department of Veterans Affairs (VA), extends various benefits to veterans and certain of their family members. Sometimes veterans may not agree with the VA's initial decisions concerning the award and/or the amount of these benefits. Within the VA, there is an extensive appeal/review process that concludes with the decision of the Board of Veterans' Appeals (BVA). Final decisions of the BVA may be appealed to the U.S. Court of Appeals for Veterans Claims (CAVC), which is an independent federal court, entirely separate from the VA.

Legislation was enacted in the 111<sup>th</sup> Congress dealing with CAVC funding and administrative matters. The 111<sup>th</sup> Congress also considered bills dealing with operational and appeal procedures to the CAVC, including bills to modify the current 120-day time limit for an appeal from the BVA's final decision to be filed with the CAVC; however, none was enacted.

On February 18, 2011, Representative Bob Filner introduced H.R. 810, the Fair Access to Veterans Benefits Act of 2011, which is similar to legislation introduced in the 111<sup>th</sup> Congress. If enacted, the bill would extend the 120-day limit for the filing of an appeal to the CAVC after a final decision of the BVA, upon a showing of "good cause" for such time as justice may require. For the purposes of this legislation, "good cause" is considered to be the inability of a person to file within the 120-day period due to a service-connected disability.

Meanwhile, the U.S. Supreme Court recently considered the 120-day time limit for appeals to the CAVC in *Henderson v. Shinseki* (U.S. No. 09-1036). In its March 1, 2011, holding, the Court determined that the 120-day rule was not jurisdictional, and therefore did not necessarily preclude consideration of appeals following its expiration, under certain circumstances. The Court did not prescribe specific criteria for these circumstances, but noted that previous legislation had been enacted and interpreted as being "favorable to veterans." Legislative and administrative action may follow to implement the 120-day rule consistently with the holding in *Henderson*. As noted above, related legislation is currently pending.

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## Legislative and Historical Background<sup>1</sup>

The Department of Veterans Affairs (VA) provides a broad range of congressionally mandated benefits and services to United States veterans and certain members of their families.<sup>2</sup> There are various eligibility criteria for such benefits and discrete processes for determining benefit claims.<sup>3</sup> Thereafter, a veteran may appeal a determination within the VA. The final appeal body within the VA is the BVA.<sup>4</sup>

For many years, judicial review of VA decisions or orders was statutorily prohibited. The first such legislation was the World War Veterans' Act of 1924.<sup>5</sup> The 1930 legislation that established the VA (formerly the Veterans Administration, now the Department of Veterans Affairs)<sup>6</sup> continued this exclusion. Section 5 of the Economy Act of 1933 provided that decisions by the VA were final and not subject to review in federal court.<sup>7</sup> These prohibitions were eliminated by the Veterans' Judicial Review Act of 1988 (VJRA),<sup>8</sup> which authorized the judicial review of BVA denials of individual veterans' claims for benefits in a new Article I court.<sup>9</sup> This court was originally named the U.S. Court of Veterans Appeals and was subsequently renamed the U.S. Court of Appeals for Veterans Claims (CAVC).<sup>10</sup> The legislation also provided for review of CAVC decisions in the U.S. Court of Appeals for the Federal Circuit.<sup>11</sup>

The CAVC's website indicates that the CAVC provides a review of decisions by the BVA that are adverse to the veteran's claim of "entitlement to benefits for service connected-disabilities, survivor benefits and other benefits such as education payments and waiver of indebtedness."<sup>12</sup> The CAVC's website provides detailed statistical information regarding the number of cases filed and the ultimate disposition of those cases.<sup>13</sup>

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<sup>1</sup> See the CAVC's "History" at <http://www.uscourts.cavc.gov/about/History.cfm>.

<sup>2</sup> See CRS Report R41343, *Veterans Medical Care: FY2011 Appropriations*, by Sidath Viranga Panangala; CRS Report RL34626, *Veterans' Benefits: Benefits Available for Disabled Veterans*, by Christine Scott and Carol D. Davis; CRS Report RL34370, *Veterans Affairs: Health Care and Benefits for Veterans Exposed to Agent Orange*, by Sidath Viranga Panangala and Douglas Reid Weimer.

<sup>3</sup> See CRS Report RL33113, *Veterans Affairs: Basic Eligibility for Disability Benefit Programs*, by Douglas Reid Weimer. Compensation for service-connected disabilities is one of the major programs that the VA administers. See CRS Report RL33323, *Veterans Affairs: Benefits for Service-Connected Disabilities*, by Douglas Reid Weimer.

<sup>4</sup> See CRS Report RL33323, *Veterans Affairs: Benefits for Service-Connected Disabilities*, by Douglas Reid Weimer, at 8.

<sup>5</sup> P.L. 68-242, § 5, 43 Stat. 607 (1924).

<sup>6</sup> P.L. 71-536, § 2, 46 Stat. 1016 (1930).

<sup>7</sup> P.L. 72-212, §§ 401-408, 47 Stat. 382 (1932).

<sup>8</sup> P.L. 100-687, § 301, 102 Stat. 4105 (1988).

<sup>9</sup> See 38 U.S.C. §§ 7251-7299. Article I courts are courts of limited jurisdiction created by Congress in the exercise of its legislative powers. In establishing an Article I court, Congress draws on authority distinct from that used to establish federal courts of general jurisdiction under Article III of the Constitution.

<sup>10</sup> Veterans Programs Enhancement Act of 1998, P.L. 105-368, § 511, 112 Stat. 3341. See 38 U.S.C. § 7251.

<sup>11</sup> 38 U.S.C. § 7292.

<sup>12</sup> See <http://www.uscourts.cavc.gov/>.

<sup>13</sup> See [http://www.uscourts.cavc.gov/annual\\_report/](http://www.uscourts.cavc.gov/annual_report/).

## Jurisdiction

The VJRA gave the CAVC the “exclusive jurisdiction to review decisions of the Board of Veterans Appeals.”<sup>14</sup> The BVA is required to notify veteran claimants of their appeal rights to the CAVC.<sup>15</sup> Only a person who is “adversely affected” by a BVA decision may appeal to the CAVC.<sup>16</sup> However, neither the Secretary of Veterans Affairs nor any other VA official may appeal a BVA decision to the CAVC.<sup>17</sup>

There are two basic jurisdictional requirements in appealing a BVA decision to the CAVC. First, an appellant may appeal only a final BVA decision on a claim for benefits to the CAVC.<sup>18</sup> Second, the appellant’s Notice of Appeal (NOA)<sup>19</sup> must be received or postmarked using the U.S. Postal Service within 120 days from the mailing of the BVA decision.<sup>20</sup> As discussed below, this 120-day time limit for appeals is the subject of congressional action<sup>21</sup> and a recent decision of the U.S. Supreme Court.

## Organization and Operation of the CAVC

The CAVC consists of at least three, but not more than seven, judges.<sup>22</sup> The judges are appointed by the President with the advice and consent of the Senate.<sup>23</sup> The judges serve for a term of 15 years.<sup>24</sup> The President may remove a judge from office prior to the expiration of his/her term for various reasons that would prevent the proper execution of the judge’s duties.<sup>25</sup> Under certain

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<sup>14</sup> 38 U.S.C. § 7252(a).

<sup>15</sup> *Id.* § 5104(a).

<sup>16</sup> *Id.* § 7266(a).

<sup>17</sup> *Id.* § 5107(a).

<sup>18</sup> *Id.* § 7266(a).

<sup>19</sup> The NOA is a notice sent by the appellant or his/her counsel seeking CAVC review of the BVA’s final decision. To be considered a NOA, the document must follow the requirements of Rule 3(c) of the CAVC’s Rules of Practice and Procedure. The NOA must provide the name, address, and phone number of appellant(s); identify the BVA decision being appealed; and provide appropriate information if being filed by the veteran’s representative.

<sup>20</sup> 38 U.S.C. § 7266(a).

<sup>21</sup> To date, no legislation has been enacted modifying the 120-day rule.

<sup>22</sup> 38 U.S.C. § 7253(a). 38 U.S.C. § 7253(b) provides that “not more than the number equal to the next whole number greater than one-half of the number of judges of the Court may be members of the same political party.” 38 U.S.C. § 7253(h) provides for the temporary expansion of the court from January 1, 2002, through August 15, 2005. The authorized number of judges provided for by 38 U.S.C. § 7253(a) was increased by two; one nominated and appointed in 2002 and one in 2003. If the appointment(s) was/were not made in 2002 or 2003, the appointment(s) could be made before October 1, 2004. Title IV, Sec. 601 of the Veterans’ Benefits Improvement Act of 2008 (P.L. 110-389) increases, as of December 31, 2009, from seven to nine the maximum numbers of judges on the CAVC. As of January 1, 2013, no appointment may be made to the CAVC that would result in there being more than nine judges.

<sup>23</sup> *Id.* § 7252(b).

<sup>24</sup> 38 U.S.C. § 7253(c) provides that when a judge who is nominated by the President for appointment to an additional term on the Court without a break in service, and whose term of office expires while that nomination is pending before the Senate, may continue in office for up to one year while that nomination is pending.

<sup>25</sup> *Id.* § 7253(b), (f). 38 U.S.C. § 7253(f) provides that a judge of the Court may be removed from office by the President on “grounds of misconduct, neglect of duty, or engaging in the practice of law.” The President may not remove a judge of the Court from office on any other ground.

circumstances, retired CAVC judges may be recalled for further service on the CAVC.<sup>26</sup> At the present time there are six judges serving in “active status.” In addition, six retired judges are currently in “recall status.”<sup>27</sup>

The court does not hold trials, hear witness testimony, or receive new evidence.<sup>28</sup> In deciding a case, the CAVC considers the BVA decision, the briefs submitted by the parties, and the record that was considered by the VA and was available to the BVA. Under some circumstances, if the issues warrant, the CAVC holds oral argument. Less than 1% of the decided cases involve oral argument.<sup>29</sup> The CAVC holds most arguments in its Washington, DC, courtroom but may occasionally conduct an argument by telephone conference call.

The court’s official opinions are published in West’s Veterans Appeals Reporter.<sup>30</sup> They are available online in Westlaw, Lexis, and without digest on the CAVC’s website.<sup>31</sup> They are also sent to the Government Printing Office (GPO) for microfilm distribution to its nationwide depository library system.

Congress delegated broad power to the CAVC to prescribe its own rules of court.<sup>32</sup> The CAVC’s rules were modeled after the Federal Rules of Appellate Procedure, and have been amended various times.<sup>33</sup> The rules are available on the CAVC’s website.<sup>34</sup>

The CAVC has a comprehensive case management system. After the record on appeal and the briefs for both sides are filed with the Clerk of the Court, they are sent to the Central Legal Staff (“staff”) within the Office of the Clerk. The staff creates an initial evaluation of the case and a memo recommending a disposition of the case. The staff recommends whether the case should be handled by one judge, a panel without argument, or a panel with argument.<sup>35</sup>

Following the staff’s review of the case file, it is forwarded to a “screening judge” who reviews the case and the staff’s evaluation and recommendation. The screening judge, a position that rotates among all CAVC judges, determines how the case will be set for the calendar. Also, until a case has been assigned, the screening judge reviews incoming motions and rules on them. The screening judge may set the case for a summary disposition by one judge or by disposition of a

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<sup>26</sup> *Id.* § 7257. Title VI, Sec. 603 of the Veterans’ Benefits Improvement Act of 2008 (P.L. 110-389) (“Act”) repeals the 180-day limit on the number of days per year a recall-eligible retired CAVC judge may voluntarily serve on the CAVC in recall status. It establishes a three-tiered retirement pay structure with respect to judges appointed on or after the date of enactment of the act. Tier one represents retired judges recalled to active service, tier two represents recall-eligible judges, and tier three represents non-recall-eligible retired judges. The act also exempts current and future recall-eligible retired judges from involuntary recall once they have served an aggregate of five years of recall service.

<sup>27</sup> See <http://www.uscourts.cavc.gov/about/judges/>. Confirmed by the CAVC January 31, 2011).

<sup>28</sup> 38 U.S.C. § 7261.

<sup>29</sup> See [http://www.uscourts.cavc.gov/annual\\_report/](http://www.uscourts.cavc.gov/annual_report/). See annual reports for 2000-2009.

<sup>30</sup> This is established by practice of the Court rather than by federal statute or regulation.

<sup>31</sup> See [http://www.uscourts.cavc.gov/resesarch\\_court\\_cases/DecisionsOpinions.cfm](http://www.uscourts.cavc.gov/resesarch_court_cases/DecisionsOpinions.cfm).

<sup>32</sup> 38 U.S.C. § 7264.

<sup>33</sup> See [http://www.uscourts.cavc.gov/court\\_procedures/RulesPracticeProcedure.cfm](http://www.uscourts.cavc.gov/court_procedures/RulesPracticeProcedure.cfm).

<sup>34</sup> *Id.*

<sup>35</sup> See [http://www.uscourts.cavc.gov/court\\_procedures/InternalOperatingProcedures.cfm](http://www.uscourts.cavc.gov/court_procedures/InternalOperatingProcedures.cfm).

panel of three judges.<sup>36</sup> The file is then returned to the Clerk, and the case will, in most cases, eventually be assigned to a panel of three judges who will ultimately decide the case.<sup>37</sup>

The appellant may represent him/herself or may be represented by an attorney or authorized representative.<sup>38</sup> The VA's Office of the General Counsel represents the Secretary of Veterans Affairs (and the VA) before the CAVC.<sup>39</sup>

Following a final decision of the CAVC, the decision may be appealed to the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit").<sup>40</sup> An appeal can be filed by either the veteran or the VA.<sup>41</sup> Appeals to the Federal Circuit are required to be filed within 60 days of the final CAVC decision.<sup>42</sup> Following a final decision by the Federal Circuit, either the veteran or the VA may petition the U.S. Supreme Court for certiorari within 90 days of the Federal Circuit's final action.<sup>43</sup>

## Legislative Interest

Legislation enacted in the 111<sup>th</sup> Congress dealt with funding and administrative issues for the CAVC's operations.<sup>44</sup> Other bills were introduced in the 111<sup>th</sup> Congress that dealt with operational aspects of the CAVC. Of major congressional interest were proposals to modify the 120-day time limit for appeals to the CAVC. However, none of these bills was enacted. A similar bill to modify the 120-day time limit for appeals has been introduced in the 112<sup>th</sup> Congress, and additional legislative activity is anticipated.

### 111<sup>th</sup> Congress

The House considered several measures to expand the 120-day filing limit for appeals to the CAVC, under certain circumstances. If enacted, the Fair Access to Veterans Benefits Act of 2010 would have extended the 120-day appeal time upon a showing of good cause for such an extension.<sup>45</sup> The bill specified that good cause would include the inability of a person to file within the 120-day period due to a service-connected disability.<sup>46</sup> The bill further would have applied the filing extension retroactively to BVA decisions issued on or after July 24, 2008. A

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<sup>36</sup> *Id.*

<sup>37</sup> There is no jury involved in this judicial procedure.

<sup>38</sup> Representation before the court is governed by U.S. Vet. App. R. 46. See [http://www.uscourts.cavc.gov/about/how\\_to\\_appeal/](http://www.uscourts.cavc.gov/about/how_to_appeal/). See CRS Report RL33704, *Veterans Affairs: The Appeal Process for Veterans' Claims*, by Douglas Reid Weimer.

<sup>39</sup> 38 U.S.C. § 7263(a).

<sup>40</sup> *Id.* § 7292.

<sup>41</sup> This contrasts with the appeals to the CAVC. Only the veteran may appeal an adverse decision of the BVA to the CAVC; the VA may not appeal a BVA decision favorable to the veteran to the CAVC.

<sup>42</sup> 28 U.S.C. § 2107.

<sup>43</sup> 38 U.S.C. § 7292(c). A petition for certiorari is a request for the Supreme Court to review the decision of the lower court. If the petition is granted, the Supreme Court will review the case.

<sup>44</sup> P.L. 111-117, 123 Stat. 3034 (December 16, 2009).

<sup>45</sup> H.R. 5064, 111<sup>th</sup> Cong., 2d Sess. (2010).

<sup>46</sup> A similar, earlier bill without the *per se* rule was introduced as H.R. 5045.



provision of the proposed Veterans Benefits and Economic Welfare Improvement Act of 2010 would have extended the appeal time limit, upon a show of good cause, also retroactively to BVA decisions issued on or after July 24, 2008.<sup>47</sup>

The Senate also considered legislative measures to extend the filing limit. The proposed Fair Access to Veterans Benefits Act of 2010 would have permitted an extension of the filing deadline upon the showing of good cause.<sup>48</sup> The bill also contained a retroactive provision applicable to BVA decisions issued on or after July 24, 2008. Another bill considered by the Senate—S. 3348—considered the situation where appeal documents have been misfiled with the BVA (rather than the CAVC), within 120 days of such decisions, and how such misfiled documents should be treated.<sup>49</sup>

## **112<sup>th</sup> Congress**

On February 18, 2011, Representative Bob Filner introduced H.R. 810, the Fair Access to Veterans Benefits Act of 2011.<sup>50</sup> The bill mirrors provisions of bills introduced in the 111<sup>th</sup> Congress. If enacted, the bill would extend the 120-day limit for the filing of an appeal to the CAVC after a final decision of the BVA, upon a showing of “good cause” for such time as justice may require. For the purposes of this legislation, “good cause” is considered the inability of a person to file within the 120-day period due to a service-connected disability.

## **Litigation Involving the 120-Day Filing Deadline**

A recent case heard by the U.S. Supreme Court, *Henderson v. Shinseki*,<sup>51</sup> involves the application and interpretation of the 120-day filing deadline for appeals from the BVA to the CAVC. As discussed below, the Court handed down its decision on March 1, 2011, and determined that the deadline for filing a notice of appeal with the CAVC did not have jurisdictional consequences. Therefore, missing the 120-day filing deadline may not prevent an appeal, under certain circumstances.

## **Decisions of the Regional Office (RO), BVA, and Lower Courts**

David Henderson had served on active military duty from 1950-1952. He was discharged in 1952 after being diagnosed with paranoid schizophrenia; he established a service connection and received and currently has a 100% disability rating. In 2001, Henderson filed a claim for monthly compensation based on need for in-home care with the VA Regional Office (RO). The RO denied the claim and Henderson appealed to the BVA. The BVA denied his claim. Henderson filed a notice appeal with the CAVC 15 days after the expiration of the 120-day appeal period (38 U.S.C. § 7266(a)).

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<sup>47</sup> H.R. 6132, 111<sup>th</sup> Cong., 2d Sess. (2010).

<sup>48</sup> S. 3192, 111<sup>th</sup> Cong., 2d Sess. (2010).

<sup>49</sup> S. 3348, 111<sup>th</sup> Cong., 2d Sess. (2010).

<sup>50</sup> H.R. 810, 112<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2011).

<sup>51</sup> U.S. No. 09-1036 (Argued December 6, 2010).

The CAVC rule, in a 2-1 decision, denied Henderson’s claim, and determined that Congress had “specifically authorized” it to conduct “independent judicial appellate review” of the Board only under “specified conditions.”<sup>52</sup> Henderson’s appeal thus was dismissed by the CAVC for lack of jurisdiction.<sup>53</sup>

Henderson appealed the CAVC’s ruling to the U.S. Court of Appeals for the Federal Circuit, in a case captioned *Henderson v. Shinseki*.<sup>54</sup> Examining the factual and legal circumstances, the Federal Circuit determined that the 120-day period was a “time of review provision” in a civil case, rather than a statute of limitations. As such, the statute was not subject to equitable tolling; it was mandatory and jurisdictional. In its opinion, the court held that if “Congress determined that the 120-day period for appeals to the Veterans Court from a decision of the Board should be subject to equitable tolling, it may amend § 7266(a) to compel a result different from the one we reach today.”<sup>55</sup> The appeals court upheld the CAVC’s finding of lack of jurisdiction and dismissed Henderson’s appeal.

### **U.S. Supreme Court—*Henderson v. Shinseki***<sup>56</sup>

Henderson appealed the decision of the appeals court to the U.S. Supreme Court. Oral argument was held before the Court on December 6, 2010. The central issue was whether the 120-day filing period with the CAVC absolutely limits the authority of the CAVC to consider a case filed beyond the filing period even when circumstances made it impracticable or impossible for the veteran to comply with those limits.

On March 1, 2011, the Court handed down its decision, which held that the 120-day rule was not jurisdictional, and did not necessarily prevent consideration of appeals after its expiration, under certain circumstances.<sup>57</sup> In a narrow holding, the Court did not prescribe or provide specific criteria for those circumstances. However, the Court noted that prior relevant legislation had been enacted and interpreted as being “favorable to veterans.”

Administrative action may follow to implement the 120-day appeals deadline consistently with the holding in *Henderson*. As discussed above, legislation is currently pending to provide guidance for flexible application of the 120-day rule, under certain specific circumstances.<sup>58</sup>

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<sup>52</sup> *Henderson*, 22 Vet. App. at 220.

<sup>53</sup> *Id.* at 220-21.

<sup>54</sup> 589 F.3d 1201 (Fed. Cir. 2009).

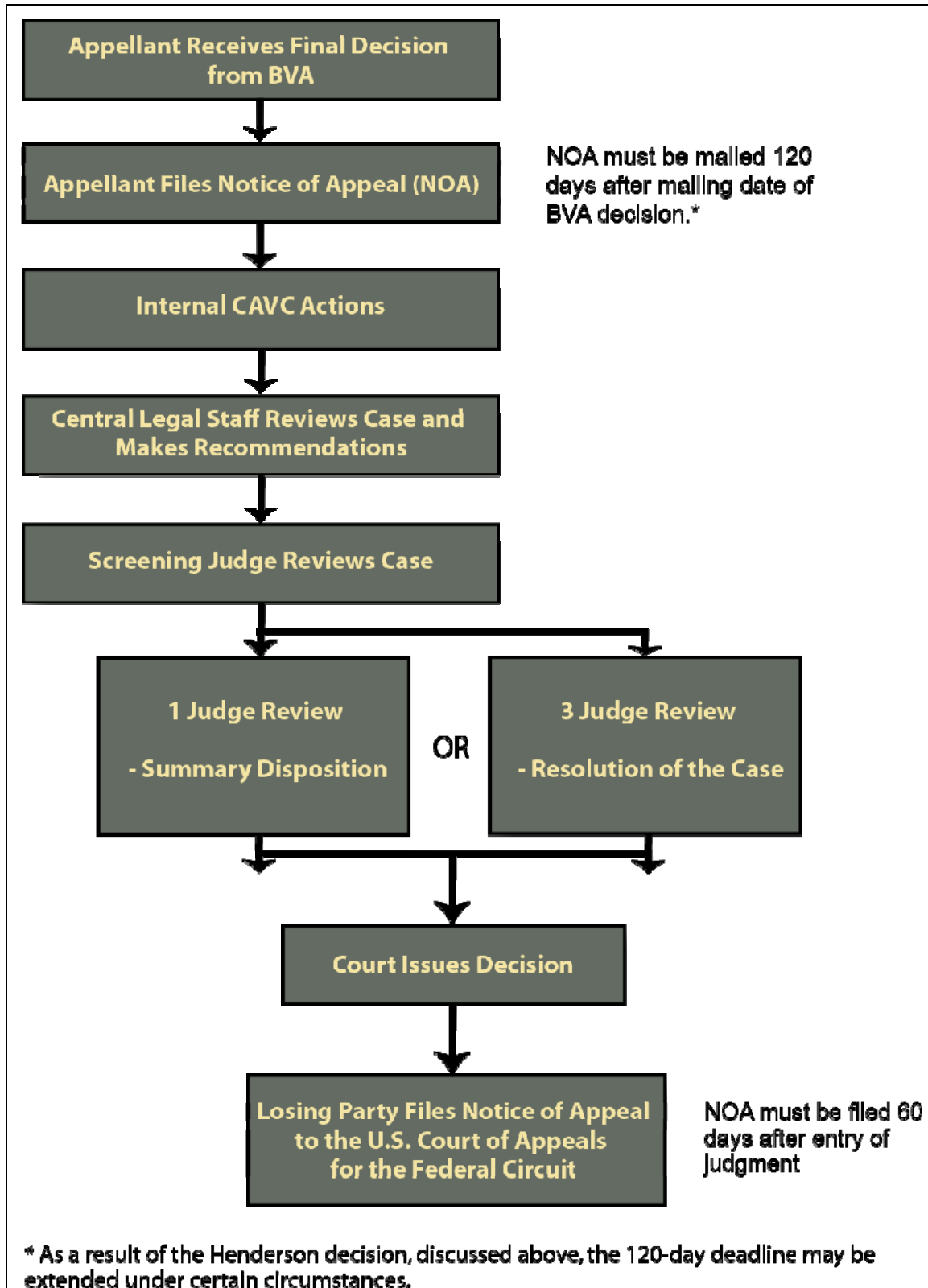
<sup>55</sup> *Id.* at 1220.

<sup>56</sup> U.S. No. 09-1036 (Argued December 6, 2010).

<sup>57</sup> *Id.* 562 U.S. \_\_\_\_ (2011).

<sup>58</sup> See discussion, p. 5.

**Figure 1. Simplified CAVC Case Review**



**Source:** Adapted by CRS from information on the CAVC website. See <http://www.vetapp.uscourts.gov/>.

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